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IN THE

Supreme Court of the United States

FIA CARD SERVICES, N.A.,

Petitioner,

v.

JOHN C. GORMAN,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CALIFORNIA APARTMENT ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER FILED WITH CONSENT OF ALL PARTIES

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BRIEF OF *AMICUS CURIAE*[1] CALIFORNIA APARTMENT ASSOCIATION IN SUPPORT OF PETITIONER[2]

INTEREST OF *AMICUS CURIAE*

The California Apartment Association ("CAA") is the largest state-wide rental housing trade associations in the country, representing more than 50,000 owners and operators who are responsible for nearly two million rental housing units throughout California. CAA has the goal of promoting fairness and equality in the rental of residential housing and aiding in the availability of high quality rental housing in California. CAA has advocated on behalf of rental housing providers in legislative, judicial and other forums in California and nationally.

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] *Amicus curiae* discloses that counsel of record for all parties received notice *of amicus curiae's* intention to file this brief eight days prior to the due date; however, despite the inadvertent late notice from *Amicus*, counsel for all parties have consented to the filing of this *amicus* brief.

Under certain circumstances, landlords may be responsible for violations of the federal Fair Credit Reporting Act ("FCRA"), and the California Consumer Credit Reporting Agencies Act ("CCRAA"), either as furnishers of consumer credit information or under an agency theory when a landlord contracts with an entity such as a collection agency which in turn reports information furnished by the landlord to a credit reporting agency ("CRA").

The term "furnisher" is not specifically defined in either the FCRA or the CCRAA. In fact, the only definition of "furnisher" is contained in relatively new regulations promulgated by the FDIC on July 1, 2009, which are effective on July 10, 2010. In those regulations, "furnisher" is defined to mean "an entity that furnishes information relating to consumers to one or more consumer reporting agencies for inclusion in a consumer report." 12 C.F.R. § 334.40. Even where a landlord or other entity does not furnish information directly to a CRA, but to an intervening collection agency which then reports the information to the CRA, under general agency law, if the collection agency violates the FCRA or the CCRAA while acting within the scope of its contractual duties for a landlord, the landlord may be liable for the violations. See Chang v. Verizon New England, Inc., 595 F.3d 26, 32 (1st Cir. 2010).

As such, it is of paramount importance to CAA and its members that this Court grant review in order to repeal the additional private rights of action for consumers against furnishers of information judicially created by the Ninth Circuit in its decision.

In addition, the multi-family housing industry throughout this country is dependent upon the voluntary furnishing of credit information. CAA submits this brief as *amicus curiae* in support of Petitioner in order to bring to the Court's attention the potentially devastating effects on the credit reporting system which likely will result from the Ninth Circuit's unprecedented expansion of the private rights of action a consumer may bring against furnishers of information. While CAA is in support of review of the other issues presented by Petitioner as well, this chilling effect alone compels a grant of review by this Court.

SUMMARY OF ARGUMENT

Most landlords rely on credit reports as part of the tenant screening process in an effort to select responsible tenants who are likely to fulfill their contractual obligations. As discussed herein, without meaningful credit information, landlords will implement stricter screening criteria which will

make it more difficult for many individuals to qualify for safe and stable rental housing. In addition, the less reliable the tenant screening process, the higher a landlord's cost of doing business, resulting in higher rents for all residents.

The decision of the Ninth Circuit Court of Appeals will have a substantial chilling effect on the willingness of landlords and other furnishers of consumer credit information to report bad debts and similar information to credit reporting agencies because of the substantially increased risk of costly litigation. While the amounts of delinquent accounts may vary significantly among residential landlords, generally the amounts of the delinquencies reported are relatively small and pale in comparison to the cost of defending even a frivolous lawsuit. Even though landlords benefit from reporting tenant defaults when screening, as reasonable business people, they likely will elect not to report the consumer information rather than run the risk of expensive litigation. This reluctance to report accurate information will render credit reports meaningless, since the reports will be woefully incomplete, thus impacting the cost and availability of rental housing.

As set forth herein, CAA respectfully urges

this Court to grant the Petition for Writ of Certiorari in order to (1) reverse the impermissible expansion of private rights of action of consumers against furnishers of information, and (2) determine there are no private rights of action against furnishers of information outside the specific mandates of the federal statute.

ARGUMENT

I. This Court Must Undo the Ninth Circuit's Judicial Expansion of Private Rights of Action for Consumers Against Furnishers of Consumer Credit Information.

A. Private Rights of Action Under CCRAA §§ 1785.25(g) and 1785.31 are Preempted by the FCRA.

As Petitioner argued in its Petition for Writ of Certiorari ("Petition"), numerous federal courts consistently have found the Fair Credit Reporting Act ("FCRA"), codified at 15 U.S.C. § 1681 *et seq.*, preempts private enforcement of the California Consumer Credit Reporting Agencies Act ("CCRAA"), codified at California Civil Code § 1785.1 *et seq.* [Petition, pp. 33-35]. Despite the consistent interpretation of the statutes by many federal

courts[3], the Ninth Circuit Court of Appeals erroneously found in this case that a consumer can bring a private right of action against a furnisher of information pursuant to Sections 1785.25(g) and 1785.31 of the CCRAA "because the plain language of the preemption provision does not apply to private rights of action and because the likely purpose of the express exclusion was precisely to permit private enforcement of these provisions. . . ." Gorman v. Wolpoff & Abramson, LLP; MBNA America Bank., N.A., 552 F.3d 1008, 1032 (9th Cir. 2009).

As to the plain language of the preemption provision, contrary to the conclusions of the Ninth Circuit, the preemption provisions apply to both Sections 1785.25(g) and 1785.31. The FCRA provides, in pertinent part, that:

> (b) *General exceptions*. No requirement or prohibition may be imposed under the laws of any State
>
> (1) with respect to any subject matter regulated under

[3] The specific case citations are set forth in the Petition at pp. 33-35 and are not repeated herein.

> (F) section 623 [§ 1681s-2], relating to the responsibility of persons who furnish information to consumer reporting agencies, except that this paragraph shall not apply
>
> . . .
>
> (ii) **with respect to section 1785.25(a)** of the California Civil Code (as in effect on the date of enactment of the Consumer Credit Reporting Reform Act of 1996); . . . .

15 U.S.C. § 1681t(b)(1)(F) (emphasis added). Only Section 1785.25(a) is saved from preemption under the express language of 15 U.S.C. § 1681t(b)(1)(F). In fact, neither Section 1785.25(g) nor Section 1785.31 are even mentioned in the preemption exclusion. As such, it was an inappropriate exercise of judicial legislation for the Ninth Circuit to expand the existing preemption language to include these provisions. Courts must be reluctant to expand narrow, specific exceptions into broad preemption provisions into general savings clauses.

As to the likely purposes of Congress, the Ninth Circuit's current interpretation is contrary to its previous observations with respect to the intent of Congress. In addressing another issue under the FCRA, the Ninth Circuit observed:

> It can be inferred from the structure of the statute that ***Congress did not want furnishers of credit information exposed to suit by any and every consumer dissatisfied with the credit information furnished.*** Hence, Congress limited the enforcement of the duties imposed by § 1681s-2(a) to governmental bodies.

Nelson v. Chase Manhattan Mortgage Corp., 282 F.3d 1057, 1060 (9th Cir. Nev. 2002) (emphasis added) (also recognizing the specifically permitted private rights of action under 1681s-2(b)).

The Ninth Circuit's recent decision is at odds with the congressional purpose it specifically acknowledged in Nelson: "*Congress did not want furnishers of credit information exposed to suit by any and every consumer dissatisfied with the credit information furnished.*" Nelson, 282 F.3d at 1060 (emphasis added). Unfortunately, the result of the

current decision, unless rectified by this Court, is to thwart this recognized Congressional purpose to preempt private causes of action against furnishers of information. Furnishers of credit information are now exposed to suit by any and every consumer dissatisfied with the credit information reported under the CCRAA.

B. The Obligation to Notify CRAs of a Dispute is Imposed by Section 1681s-2(a), not 1681s-2(b); Therefore, Consumers Do Not Have a Private Right of Action Against Furnishers of Credit Information for Failing to Report Back to a CRA that the Consumer Disputes the Information.

In its decision, the Ninth Circuit recognized that Section 1681s-2(a)(3) of the FCRA requires furnishers to report that a consumer disputes the accuracy of credit information under the circumstances identified in the statute. Gorman, 552 F.3d at 1022. The Ninth Circuit also conceded that only federal or state officials have the authority to bring claims under 15 U.S.C. § 1681s-2(a). Id. In order to create a consumer private cause of action under the circumstances presented, the Ninth

Circuit then found "a disputed credit file that lacks a notation of dispute may well be 'incomplete or inaccurate' within the meaning of the FCRA, and the furnisher has a privately enforceable obligation to correct the information after notice. § 1681s-2(b)(1)(D)." Gorman, 552 F.3d at 1024. Essentially, the Ninth Circuit transferred the requirements for reporting a dispute that are set forth in 1681s-2(a)(3) into 1681s-2(b)(1)(D) in order to create a privately enforceable obligation even though there is nothing in Section 1681s-2(b) that requires a furnisher to report a dispute to a CRA. Once again, the Ninth Circuit is expanding impermissibly the scope of 1681s-2(b) and exposing furnishers of information to litigation that Congress intended to avoid and that will have a chilling effect on voluntary reporting of consumer credit information.

II. The Ninth Circuit's Decision Will Have a Detrimental Impact on Millions of Individuals Associated with the Multi-Family Housing Industry.

As stated above, most landlords rely on credit reports as a critical part of the tenant screening process in an effort to select responsible tenants who are likely to fulfill their contractual obligations. Accurate credit reports provide valuable information

for landlords to assess whether a particular individual is likely to pay rent on time and in full, abide by the rules of the apartment community and comply with the terms of rental agreements. Historically, applicants with several delinquent accounts do not pay their rent on time and do not perform under the lease. Further, individuals with bad credit are more inclined than individuals with good credit to skip out on a lease early leaving the landlord with bad debt and collection costs.

Landlords traditionally minimize their risk of bad debt and substantial collection costs by reviewing credit reports of potential tenants, which, until the Ninth Circuit's decision in Gorman, have been fairly reliable given the widespread reporting of information. While there is little value to a landlord or other entity to report a delinquent account or bad debt to a CRA since the individual has already failed to meet his or her obligations as to the reporting entity, the system is dependent upon all entities which extend credit furnishing the information voluntarily so that it is available for the next landlord or entity which is considering extending credit to the individual. If landlords or other entities stop reporting credit information because of a genuine fear that consumers will bring civil actions against them for reporting that information, then the

credit reporting system as a whole will fail because the information in the system will no longer give an accurate picture of anyone's credit-worthiness due to the decline in voluntary reporting.

Landlords as an industry already suffer under litigation tactics often employed by "dissatisfied" tenants, who know and understand the significant costs to the landlord of defending even frivolous claims. As a result, landlords generally make concerted efforts to foreclose any possibility of private civil litigation. Allowing consumers to privately enforce additional provisions of the FCRA and the CCRAA will have a devastatingly chilling effect on the reporting of information which, in turn, will have a detrimental effect not only on landlords, but also on renters as well.

Depending on the credit-worthiness of potential tenants, landlords are able to reduce security deposits, income requirements and prior rental history requirements. If fewer entities report consumer credit information, landlords will not have meaningful information on which to evaluate the credit-worthiness of applicants. As a result, CAA anticipates landlords will start charging the maximum security deposit allowed under the law in order to protect themselves against unanticipated

delinquencies or breaches of rental agreements. This can increase the initial costs of renting an apartment for consumers by an average of one to three thousand dollars depending on the area and the type of unit at issue.

CAA also anticipates many landlords will impose more stringent financial eligibility requirements if they are unable to meaningfully evaluate the credit-worthiness of an applicant. Most landlords in California require potential tenants to have gross income of two-and-a-half to three times the rent amount. If a landlord is not confident that delinquent accounts are being reported, they will be more concerned about whether a household has sufficient funds to meet its rental obligations and all other expenses. As a result, it is easy to envision many landlords requiring gross income as much as four to five times the rent before accepting an applicant. This higher income requirement will pose a particular hardship on moderate income tenants who will not be able to meet the higher income standard, but who otherwise may have been able to qualify for an apartment based upon their excellent credit-worthiness.

Degradation of the credit reporting system from the failure of a substantial number of entities

reporting credit information most likely also will cause landlords to increase rent levels for all tenants. If a landlord does not have a reliable means to check the credit-worthiness of a tenant, it is highly likely that it will lease apartments to more "bad" tenants, which will lead to higher bad debt costs and higher collection costs. As the cost of doing business for landlords increases, those costs are ultimately passed on to residents in the form of higher rent. As a result, good tenants will be paying higher rent because of the landlords' inability to screen out potentially bad tenants in advance.

Finally, if reliable credit information is not available, landlords will turn to other means of acquiring the information such as prior landlord references. This will make it much more difficult for students and other traditionally new residents to find suitable housing because many landlords will not be willing to take a chance on applicants without a proven rental record – and this is only one industry. CAA is confident similar changes will occur in all other industries which rely on credit reports to make fundamental business decisions.

The Ninth Circuit's decision has far-reaching implications well beyond the parties of the case. The judicial expansion of private causes of action can

have a devastating impact on the entire multi-family industry and CAA urges the Court to grant review to prevent such a result.

III. Failure of California Businesses to Voluntarily Report Consumer Credit Information Can Have a Devastating Effect Across the Country.

There is an old saying: "as goes California, so goes the Nation." While the issues addressed above primarily impact furnishers of information in California, what happens in California impacts the national economy. According to U.S. Department of Commerce estimates, California's Gross Domestic Product was slightly more than $1.8 trillion, which made California the world's eighth-largest economy in 2008. [U.S. Bureau of Economic Analysis]. Further, California is home to one in eight Americans and thus, not surprisingly, represents the single largest automobile and retail sales market in the country. If California businesses stop reporting credit information voluntarily, it is easy to imagine Californians will obtain less credit and consequently decrease their spending greatly impacting the economy well beyond the borders of California.

CONCLUSION

The decision of the United States Court of Appeals for the Ninth Circuit presents issues with far-reaching implications. This Court must grant review in order to repeal the additional private rights of action for consumers against furnishers of information judicially created by the Ninth Circuit in its decision.

April 16, 2010 Respectfully Submitted,

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